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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Person and Estate of
JEAN L. MORSE.

NORTHERN TRUST, N.A., as
Conservator, etc.,

Petitioner and Respondent,

v.

STEVEN MORSE et al.,

Objectors and Appellants.

D059286

(Super. Ct. No. P191462)

APPEAL from an order of the Superior Court of San Diego County, Gerald C. Jessop, Judge. Appeal dismissed. Sanctions motion granted and matter remanded for further proceedings.

In this substituted judgment proceeding, conservator Northern Trust, N.A. (Northern), sought to execute a proposed living trust for conservatee Jean L. Morse. Steven Morse and David Morse (Appellants) are Jean's stepsons. In an earlier appeal from an order sealing a page of the proposed trust containing the identity of the trust

beneficiaries, we concluded that Appellants lacked standing to appeal and dismissed the appeal. (*Conservatorship of Morse* (Dec. 23, 2011, D058631) [nonpub. opn.] (the Prior Opinion).) In the meantime, the trial court struck Appellants' objection to the substituted judgment finding that Appellants lacked standing. It granted the substituted judgment petition and later issued a written order stating that Appellants lacked standing.

Appellants appealed from the order granting the substituted judgment petition arguing that the trial court: (1) erroneously concluded that they lacked standing; and (2) that the order granting the substituted judgment petition should be reversed because the proceedings were fatally flawed. In turn, Northern filed a motion for sanctions, arguing that Appellants' standing argument is unmeritorious and that the appeal is being prosecuted for an improper purpose. We requested further briefing on the impact of the Prior Opinion on this appeal. Northern responded to our request, Appellants did not.

Before the date scheduled for oral argument, Appellants filed a request to dismiss the appeal. Northern did not oppose the dismissal request and the parties argued the motion for sanctions.

We dismiss the appeal and grant Northern's motion for sanctions. Northern is awarded sanctions in the amount of any attorney fees or costs incurred by it after the Prior Opinion became final. We remand the matter to the trial court to determine the amount of sanctions.

Appellants' unopposed request for judicial notice dated November 15, 2011, is denied as moot.

DISCUSSION

Northern asks for sanctions against Appellants and/or their counsel arguing that Appellants' standing argument was unmeritorious and that they brought this action and the appeal to harass Jean and Northern. It seeks sanctions in an amount equal to the reasonable attorney fees it incurred in defending this action, and additional sanctions equaling the costs expended by the court in hearing the appeal. We previously ordered that the sanctions motion would be heard, considered and ruled upon contemporaneously with the merits of the appeal. Appellants filed a written response to the motion and have had the opportunity to argue against the motion at oral argument.

"When it appears to the reviewing court that [an] appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (Code Civ. Proc., § 907; see also Cal. Rules of Court, rule 8.276.) "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) Although a finding of either standard is enough to warrant sanctions, "[t]he two standards are often used together, with one providing

evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Id.* at p. 649.)

Here, we issued the Prior Opinion on December 23, 2011, after Appellants filed their opening brief, but before they filed their reply brief. Appellants' reply brief did not address the Prior Opinion. Additionally, Appellants did not respond to our request for further briefing on the impact of the Prior Opinion on this appeal and waited until shortly before the scheduled oral argument on the appeal to request to dismiss the appeal.

We find that any reasonable attorney would agree that this appeal, which asserts the same standing argument addressed in the Prior Opinion, became totally and completely without merit when the Prior Opinion became final on February 2, 2012. (See Cal. Rules of Court, rule 8.500.) The total lack of merit of the appeal is also evidence that the Appellants continued to prosecute the appeal solely for delay or harassment of Northern or Jean.

We grant Northern's motion for sanctions for a frivolous appeal against Appellants and their counsel on appeal, jointly and severally. The amount of sanctions shall be determined by the trial court upon remand. (See, e.g., *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 461.)

DISPOSITION

The appeal is dismissed. Respondent is entitled to its costs on appeal. Respondent's motion for sanctions is granted. The matter is remanded to the trial court to determine the reasonable value of the fees and expenses incurred by Respondent in

resisting this appeal starting from the time the Prior Opinion became final. The trial court shall thereupon order Appellants and their counsel on appeal, jointly and severally, to pay Respondent a sum equal to such fees and expenses.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.